(1) 89-1010

Supreme Court, U.S.
DEC 27 1989

No.

IN THE
Supreme Court Of The United States

October Term, 1989

LIH Y. YOUNG,

Petitioner,

v.

NATIONAL CENTER FOR HEALTH SERVICES RESEARCH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Can an amendment to a complaint changing the name of the defendant relate back to the original filing where equitable reasons exist to extend the applicable statute of limitations?

2. Is the Secretary of a cabinet level department of the federal government the only appropriate defendant in an action under Title VII of the Civil Rights Act of 1964, as amended, filed by an employee of such a department?

PARTIES TO THE PROCEEDINGS

The parties to this petition are the same as the parties to the appeal and civil action below, as reflected in the caption. However, this case reaches this Court, in part, on petitioner's effort to add the Secretary of the Department of Health and Human Services as a defendant.

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OPINIONS BELOW

The opinion from which review is sought, Young v. National Center for Health Services Research, No. 88-1017, (4th Cir. September 27, 1989), is unpublished. It is reproduced at pages 32a-42a of the Appendix hereto. The district court opinion is reported at 704 F. Supp. 88 (D. Md. 1988) and is reproduced at pages 43a-53a of the Appendix hereto.

A previous opinion of the Court of Appeals for the Fourth Circuit in this matter is reported at 828 F. 2d 235 (4th Cir. 1987) and is reproduced at pages 54a-66a of the Appendix hereto. The edited transcript of the opinion of the magistrate, dated March 7, 1986, is unreported and is reproduced at pages 67a-84a of the Appendix hereto. The final decision of the Equal Employment

Opportunity Commission, dated May 3, 1985 (Appeal No. 01842738), on petitioner's administrative appeal from the decision of the Department of Health and Human Services is unreported and reproduced at pages 85a-95a of the Appendix hereto. The final decision of the Department of Health and Human Services, dated August 20, 1984, on petitioner's administrative complaint of employment discrimination (File No. ASH-401-84) is unreported and is reproduced at pages 96a-106a of the Appendix hereto.

JURISDICTION

The Fourth Circuit Court of Appeals decided this case and entered judgment on September 27, 1989.

This Court's jurisdiction arised

pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS AND RULES

This action is based on Title VII of the Civil Rights Act of 1964, as amended, which provides in pertinent part:

Section 2000e-16(c) [Sec. 717(c)]: Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred eighty days from the filing of the initial charge with the department, agency or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

The Federal Rule of Civil Procedure involved in this case is Rule 15, which provides in pertinent part:

(c) Relation Back of Amendments. Whenever the claim or defense assserted in the amended pleading arose out of the same transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

STATEMENT OF THE CASE

Petitioner was employed by the National Center for Health Services Research (hereinafter "National Center),

a unit of the Department of Health and Human Services. In March, 1984, she resigned from her employment. At the time she resigned, Mr. John Marshall was the Director of the National Center.

Within thirty (30) days after she resigned her employment, petitioner contacted an Equal Employment Opportunity (EEO) Counselor to complain about the discriminatory treatment she received as an employee, claiming that it compelled her to resign. Petitioner filed an administrative complaint claiming employment discrimination in accordance with 29 C.F.R. Sec. 1613.214. The Department of Health and Human Services rejected the complaint as untimely, concluding that petitioner had not contacted an EEO Counselor within thirty (30) days after the occurrence of

the events she complained about, as required by 29 C.F.R. Sec. 1613.214. (App.96a-106a)

Petitioner timely appealed the Department's decision to the Equal Employment Opportunity Commission ("EEOC") pursuant to 29 C.F.R. Sec. 1613.233. The EEOC affirmed the Department's decision, advising petitioner that she could seek judicial review against the Department in U.S. district court. (App. 85a-95a)

Proceeding pro se, petitioner filed suit under section 717 of the Civil Rights Act of 1964, as amended. 42 U.S.C. Sec. 2000e-16 et seq. She named the defendant as follows:

> National Center for Health Services Research,
> 5600 Fishers Lane
> Park Building, Room 3-50
> Rockville, Maryland 20857

Attn: John Marshall, Director (See App. 34a) Suit was timely filed on a form supplied by the Clerk of the district court. Service was made by the U.S. Marshals Service thirty-one (31) days after the time for filing suit, pursuant to 42 U.S.C. Sec. 2000e-16(c), expired.

Upon referral to a magistrate, an evidentiary hearing was held to determine whether petitioner timely initiated the administrative proceedings and thereby properly exhausted her administrative remedies. The magistrate determined that petitioner had not timely contacted an EEO Counselor. (App. 67a-84a) The case was dismissed.

Petitioner secured counsel and appealed. The Court of Appeals for the Fourth Circuit reversed, finding that

since petitioner claimed constructive discharge, the time within which she was required to contact an EEO Counselor began to run on the date she resigned. (App. 64a) The court found that petitioner did contacted an EEO Counselor within thirty (30) days after she resigned and remanded the case for a decision on the merits. (App. 64a-66a)

On remand, the Department of Health and Human Services moved to dismiss for lack of subject matter jurisdiction because petitioner had not named the Secretary of the Department as the defendant. Assuming that the Secretary was the only proper defendant, previous counsel for the plaintiff moved to amend the complaint to name the Secretary and opposed dismissal.

The district court denied the amendment and dismissed the case, reasoning that the complaint could not relate back to the original filing under Rule 15 and that the court lacked subject matter jurisdiction over the original complaint because the Secretary was not named. (App. 43a-53a)

Petitioner appealed. She argued that a proper defendant, John Marshall, Director of the National Center, had been named as a defendant. She also argued that the her amendment should have been permitted to relate back to the original filing, as equitable reasons existed for extending the statute of limitations and thereby the time within which notice to the Secretary could be received.

The court of appeals, held that the amendment was properly denied, as service was not made within the statutory thirty (30) day time period for filing suit. (App. 32a-42a) The court also held that petitioner's previous counsel conceded that the proper defendant had not been named and therefore, petitioner could not argue that she named a proper defendant. (App. 32a-42a)

Petitioner requests that this honorable Court review and reverse the decision of the Fourth Circuit.

REASONS FOR GRANTING THE PETITION

I. A CONFLICT EXISTS AMONG THE CIRCUITS ON WHETHER OR NOT THE THIRTY DAY STATUTE OF LIMITATIONS OF 42 U.S.C. SEC. 2000e-16(c) MAY BE EXTENDED FOR EQUITABLE REASONS SO AS TO PERMIT AN AMENDMENT CHANGING THE NAME OF THE DEFENDANT TO RELATE BACK UNDER RULE 15(C)

The decision below differs from the decisions of the Court of Appeals for the District of Columbia Circuit in Mondy v. Secretary of the Army, 845 F.2d 1051 (D.C. Cir. 1988), and the Court of Appeals for the Eighth Circuit in Warren v. Department of the Army, 867 F.2d 1156 (8th Cir. 1989). A conflict exists among the circuits on two relevant issues. First, the circuits are split as to whether, in appropriate circmstances, the statute of limitations in 42 U.S.C. Sec. 2000e-16(c) may be equitably extended, thus extending the Rule of Civil Procedure 15(c)'s "period provided by law for commencing the action" in order to permit amendments to relate back. Second, the circuits are split on whether the 30 day limitation

of 42 U.S.C. Sec. 2000e-16(c) is a statute of limitation permitting equitable extension, or jurisdictional and precluding any extension.

The decision below by the Fourth Circuit permits no such extension of Rule 15(c)'s notice period and refuses to permit any equitable extension under 42 U.S.C. Sec. 2000e-16(c).

The Seventh Circuit in Williams v. United States Postal Service, 873 F.2d 1069 (7th Cir. 1989) also refuses to recognize such an extension.[1] The rule announced in the decision below is a rigid rule, turning a statute of

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[1] The Seventh Circuit has recognized one exception, holding that the notice period of Rule 15(c) may be extended when the plaintiff has filed a petition to proceed in forma pauperis. Paulk v. Department of the Air Force, 830 F.2d 79, 82 (7th Cir. 1987).

limitations[2] into a jurisdictional prerequisite to suit.

In Mondy v. Secretary of the Army, 845 F.2d 1051, the Court of Appeals for the District of Columbia Circuit held that the 30 day statute of limitations in 42 U.S.C. Sec. 2000e-16(c) can be extended in appropriate circumstances.

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[2] In Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984), this Court stated that the time for a non-federal sector employee to file suit, under 42 U.S.C. Sec. 2000e-5(f)(1), is a statute of limitation, subject to equitable extensions in appropriate cases. The majority of circuits that have considered the issue hold that the time for a federal emplolyee to file suit under 42 U.S.C. Sec. 2000e-16(c) is not jurisdictional, but a statute of limitation. See Warren v. Department of the Army, 867 F.2d 1156; Mondy v. Secretary of the Army, 845 F.2d 1051; Boddy v. Dean, 821 F.2d 346 (6th Cir. 1987); Hornsby v. United States Postal Service, 787 F.2d 87 (3rd Cir. 1986); Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984); Milam v. United States Postal Service, 674 F.2d 860 (11th Cir. 1982).

It further permitted such a period of extension to be a part of the "period provided by law for commencing the action" for the purposes of Rule 15(c). In Mondy, the complaint was timely, but named a purportedly improper defendant. The plaintiff relied on the U.S. Marshals Service to make service. In this case, petitioner timely filed her action against a purportedly improper defendant and relied upon the U.S. Marshals Service to effect service. In both cases, service was not effected until after the statute of limitations expired. In Mondy, the District of Columbia Circuit equitably extended the limitations period and similarly extended the Rule 15(c) notice period to permit an amendment that would relate back.

In this case, the Fourth Circuit explicitly refused to interpret Rule 15(c)'s notice period as being amenable to any extension beyond the 30 days contained in 42 U.S.C. Sec. 2000e-16(c).

The Eighth Circuit has endorsed the District of Columbia Circuit's approach[3], whereas the Seventh Circuit endorses the Fourth Circuit's rule.[4] The circuits permitting equitable extension of the limitations period to provide a basis for satisfying Rule 15(c) is timely notice requirement do not create an exception to Rule 15(c)'s requirements. They read Rule 15(c)'s notice "within the period provided by

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[3] Warren v. Department of the Army, 867 F.2d 1156.

[4] Williams v. United States Postal Service, 873 F.2d 1069.

law for commencing the action" as being notice within the statute of limitations, recognizing that the statute of limitations may be equitably extended.

The decision below, however, rigidly requires notice within the limitations period. Because the decision below fails to recognize that "the period provided by law for commencing the action" may be equitably extended to permit amendments where the statute of limitations should be equitably extended, it turns the statute of limitations into a jurisdictional barrier that may not be extended where a mistake was made concerning the identity

of the proper defendant.[5]

In Rys v. United States Postal Service, 702 F.Supp. 945 (D.Mass. 1989), the court avoided making a decision on whether the statute of limitations and the notice period are equally amenable to extension by finding that there was the requistite notice for an amendment to relate back. However, the court recognized that dismissal as required by the Fourth and Seventh Circuits requires

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[5] The Fourth Circuit noted that it, as did this Court in Shiavone v. Fortune, 477 U.S. 21 (1986), refuses to read the reasonable time requirement for service under Rule 4 of the Federal Rules of Civil Procedure into the notice period under Rule 15(c). The equitable extension recognized by other Circuits and urged here is not the "reasonable time" extension for service rejected by this Court. The equitable extension of the statute of limitations is inherently a part of the "period provided by law for commencing the action," under Rule 15(c).

that the statute of limitations of 42 U.S.C. Sec. 2000e-16(c) be a jurisdictional limitation. The court further recognized a "divisive split" among the circuits as to whether 42 U.S.C. Sec. 2000e-16(c)'s 30 day limitation period is juridictional. 704 F.Supp. at 948.

Currently, six circuits, i.e., the Third, Sixth, Eighth, Tenth, Eleventh, and District of Columbia have either held or indicated that the limitation is a statute of limitation and is not jurisdictional. See Warren v. Department of the Army, 867 F.2d 1156 (8th Cir. 1989); Mondy v. Secretary of the Army, 845 F.2d 1051 (D.C. Cir. 1988); Boddy v. Dean, 821 F.2d 346 (6th Cir. 1987); Hornsby v. United States Postal Service, 787 F.2d 87 (3rd Cir.

1986); Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984); Milam v. United States Postal Service, 674 F.2d 860 (11th Cir. 1982).

Three circuits, i.e., the Fifth, Seventh, and Ninth, have held the limitations period to be jurisdictional. Mahoney v. United States Postal Service, 884 F.2d 1194 (9th Cir. 1989); Williams v. United States Postal Service, 873 F.2d 1069 (7th Cir. 1989); Paulk v. Department of the Air Force, 830 F.2d 79 (7th Cir. 1987); Lamb v. United States Postal Service, 852 F.2d 845 (5th Cir. 1988); Bell v. Veterans Administration Hospital, 826 F.2d 357 (5th Cir. 1988)[6];

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[6] A panel of the Court of Appeals for the Fifth Circuit, noting the split among the Circuits and its own jurisdictional rule, has urged reconsideration of that Circuit's precedent holding the 30 day time limit to be jurisdictional. Hernandez v.

Cooper v. United States Postal Service, 740 F.2d 714 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985).

This Court has twice denied certiorari in cases presenting the issue of whether the 30 day time limitation of 42 U.S.C. Sec. 2000e-16(c) is jurisdictional, over dissents noting a split in the circuits. Cooper v. United States Postal Service, 471 U.S. 1022 (1985); Stuckett v. United States Postal Service, 469 U.S. 898 (1984). Since denial of certiorari in the Cooper and Stuckett cases, the split in the circuits has grown and sharpened. Six of the circuits, noted above have announced their rules since 1985. Four of the six hold the limitations period

Aldridge, 866 F.2d 800 (5th Cir. 1989).

to be non-jurisdictional, and two of the six hold that it is jurisdictional. Most importantly, this split has resulted in a split among the circuits as to the proper application of Rule 15(c)'s notice requirement.

The split among the circuits permits and indeed has widened. This Court should intervene to resolve the split in the circuits.

II. THIS COURT'S REVIEW IS NECESSARY TO END CONFUSION AMONG LOWER COURTS AND LITIGANTS INTERPRETING 42 U.S.C. SEC. 2000e-16(c)

Section 2000e-16(c) states that in any lawsuit brought under 42 U.S.C. Sec. 2000e-16 "the defendant shall be the head of the department, agency, or unit, as appropriate." This Court has never analyzed and interpreted 42 U.S.C. Sec.

2000e-16(c) with respect who may be named as a federal government defendant. In fact, petitioner's research has revealed only two decisions in the seventeen years since its enactment that purport to analyze and interpret that section. The application and interpretation of the section has not been consistent among the district courts or the courts of appeals.

Petitioner named as the defendant in her civil action both the unit of the Department of Health and Human Services in which she worked and the "head" of that unit. Her complaint was filed against the

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> 5600 Fishers Lane
> Park Building, Room 3-50
> Rockville, Maryland 20857
>
> Attn: John Marshall, Director

(App. 34a).[7]

In Stephenson v. Simon, 427 F.Supp. 467 (D.D.C. 1976), the district judge interpreted section 2000e-16(c) to mean that there is only one proper defendant

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[7] The Court of Appeals determined that petitioner's previous counsel conceded that a proper defendant was not named and, therefore, refused to address the argument that a proper defendant, the "head" of the "unit" in which she was employed was named. Ordinarily stipulations of the sort the court considered to be a concession are binding. However, a party may be relieved of the binding nature of such a stipulation when "manifest injustice" will result from enforcement of the stipulation or the stipulation was entered on an erroneous view of the facts or law. See Grafenhain v. Pabst Brewing Co., 870 F.2d 1198 (7th Cir. 1989). Here, manifest injustice will result. Petitioner is deprived of the opportunity to have her timely lawsuit heard. Also present in this case is the fact that the stipulation was based on an erroneous view of the law. Petitioner's previous counsel assumed that a proper defendant was not named. As is illustrated herein, the law governing who are proper defendants is far from clear.

in a Title VII case against a federal employer. According to that court, the defendant must be the person highest in the chain of command within a cabinet department, a military department, or an independent agency.

The District of Columbia Circuit, faced with a case in which it could endorse the Simon interpretation, refused to do so. Mondy v. Secretary of the Army, 845 F.2d at 1052 n.1 (expressly declining to opine as to who may be a proper defendant under 42 U.S.C. Sec. 2000e-16(c)). In Mondy, Senior Judge MacKinnon noted that his interpretation of the section permits suit against a variety of defendants, provided they are "appropriate" under the circumstances of the case. 845 F.2d at 1059. To Judge MacKinnon, the naming

in that case of an Army Colonel who was the base commander was sufficient under the statute.

The only circuit opinion purporting to analyze and interpret the section actually does no more than quote Simon and adopt its interpretation. See Hancock v. Egger, 848 F.2d 87 (6th Cir. 1988)(holding that Secretary of the Treasury was the only proper defendant and that suit could not be maintained against the Commissioner of Internal Revenue). Other ciruits have noted that the section is unclear.[8] The Seventh Circuit stated that the phrase "head of the department, agency, or unit, as

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[8] The Fourth Circuit recently stated that the section "is clear; the head of the department for which the plaintiff works is the proper defendant ..." Gardner v. Gartman, 880 F.2d 797, 799 (4th Cir. 1989).

appropriate," is "cryptic . . . provid[ing] little guidance to litigants." Paulk v. Department of the Air Force, 830 F.2d 79, 80 (7th Cir. 1987). The Third Circuit, in Williams v. Army and Air Force Exchange Service, 830 F.2d 27, 31 (3rd Cir. 1987), "strongly urge[d]" federal agencies, including the Justice Department, to provide litigants with clear guidance on who should be sued.

The Third Circuit's Williams decision dismissed a complaint filed only against a unit of a federal cabinent level department. However, the court noted that the plaintiff had a choice of proper defendants under 42 U.S.C. Sec. 2000e-16(c). According to the Third Circuit, either the "Secretary of Defense or the head of the agency

(AAFES)" would be a proper defendant. 830 F.2d at 29 (emphasis added). Similarly, the Fifth Circuit observed that 42 U.S.C. Sec. 2000e-16(c) provides a choice of defendants. In Harris v. Department of Transportation, 843 F.2d 219, 220 (5th Cir. 1988), the court, dismissing the complaint, stated that an employee of the Coast Guard, a part of the Department of Transportation could sue the "head of the Coast Guard." Other courts have reached similar results.[9]

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[9] I.M.A.G.E. v. Bailar, 78 F.R.D. 549 (N.D. Cal. 1978)(Postmaster General and officials lower in the chain of command are appropriate defendants); Guilday v. Department of Justice, 451 F.Supp. 717, 726 (D.Del. 1978)("The wording of Title VII leaves the Court considerable discretion to decide which defendant is the 'appropriate' one."); Beasley v. Griffin, 427 F.Supp. 801, 803 (D.Mass. 1977)("since each [defendant] may be described as a 'head' of the department, aganecy or unit in question

Seventeen years have elapsed since Title VII was amended to permit actions against the federal government. Despite seventeen years of litigation and hundreds of cases, a fundamental interpretive problem continues to infect application of 42 U.S.C. Sec. 2000e-16(c). The Courts of Appeals do not uniformly apply the section and avoid

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here--the Boston Region of the United States Customs Service [a part of the Treasury Department]--I see no persuasive reason to dismiss the complaint against any of them."); Mosley v. United States, 425 F.Supp. 50, 55 (N.D. Cal. 1977)(Lieutenant Commander who was head of the Navy Postgraduate School was the "only proper defendnant."); Schenk v. Pyles, 17 FEP Cases (BNA) 1469 (D.D.C. 1976)("Head" of the Federal Aviation Administration, a part of the Department of Transportation, was the proper defendant); Jones v. United States, 376 F.Supp. 13, 14 n.3 (D.D.C. 1974)(Administrator of Agency for International Development, a part of State Department, was the proper defendant).

interpreting it. This Court's interpretation of the section is necessary to ensure uniform treatment from one court to another and to end the confusion experienced by lower courts, practitioners and litigants.

CONCLUSION

Because the decision below creates and deepens conflits among the circuits in the application and interpretation of 42 U.S.C. Sec. 2000e-16(c) and Rule 15 of the Federal Rules of Civil Procedure; because this Court's guidance is needed to avoid further confusion and conflicting decisions in cases involving employees of the federal government; and because the decision below fails to correctly interpret either Rule 15(c) of the Federal Rules of Civil Procedure or

42 U.S.C. Sec. 2000e-16(c), a writ of certiorari should issue and the decision below should be reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-1017

LIH Y. YOUNG,
Plaintiff-Appellant,

versus

NATIONAL CENTER FOR HEALTH SERVICES RESEARCH,
Defendant-Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge. (CA-85-2547-Y)

Argued: February 9, 1989
Decided: September 27, 1989

Before Ervin, Chief Judge, and Russell and Widener, Circuit Judges.

PER CURIAM:

Lih Y. Young appeals the dismissal of her case for lack of jurisdiction. Finding no error, we affirm the decision

of the district court.

I.

Appellant Lih Y. Young, Ph.D., is a former employee of the National Center for Health Services Research (the "Center"), as part of the Department of Health Services ("DHHS"), which is supervised by the Assistant Secretary for Health. In June 1984, Dr. Young filed an administrative complaint against the Center, alleging that the Center discriminated against her on the basis of national origin and that she was forced to resign in March 1984. The complaint was rejected by DHHS, which ruled that Dr. Young had failed to bring her complaints to the attention of an Equal Employment Opportunity ("EEO") Counselor within 30 days. Dr. Young appealed to the EEO, which affirmed the

decision of the DHHS. Dr. Young, proceeding pro se, filed a civil action in the District Court for the District of Maryland on June 14, 1985. The complaint was captioned in pertinent part:

> National Center for Health Services Research
> .....
> Attn: John Marshall, Director

The Attorney General, the United States, and the Center were served on July 18, 1985, thirty-four days after the filing of the complaint.

After the case was referred to a magistrate, the magistrate dismissed the action for failure to exhaust administrative remedies; the magistrate found that Dr. Young did not contact an EEO counselor in a timely manner. Dr. Young obtained counsel and appealed.

This court reversed, holding that the date of her resignation, 29 days before her first contact with the EEO officer, was the appropriate date to start the running of the 30-day limit where a plaintiff had alleged constructive discharge. Young v. National Center for Health Services Research, 828 F.2d 235, 238 (4th Cir. 1987). The case was remanded to the district court for a decision on the merits.

On remand, the defendant moved to dismiss the lack of subject matter jurisdiction, claiming that Dr. Young had failed to name the proper defendant--the Secretary of DHHS. Dr. Young opposed the motion. She also moved to amend the complaint to specifically relate back to the original complaint date pursuant to Fed.R.Civ.P. 15. The

district court denied the motion, holding that the motion to amend could not relate back under Fed.R.Civ.P. 15 because service had not been made within the proper statute of limitations as mandated by that Rule. Young v. National Center for Health Services Research, 704 F. Supp. 88, 90 (D.Md. 1988). This appeal followed.

II.

In this appeal, we are asked to decide (1) whether the district court erred when it dismissed Dr. Young's action for lack of jurisdiction because she failed to name the proper defendant, and (2) whether the district court erred when it denied Dr. Young's motion to amend her complaint.

III.

The district court, relying on 42

U.S.C. sec. 2000e-16(c), dismissed appellant's suit because the proper defendant had not been named. That statute provides in pertinent part:

> [A]n employee . . . if aggrieved by the final disposition of his [administrative] complaint, . . . may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant. 42 U.S.C. sec. 2000e-16(c) (emphasis added).

Appellant contends that the district court erred in dismissing her action because she in fact did name the proper defendant: John Marshall, head of the "unit" in which she worked.[1]

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[1] At the time the complaint was filed, John Marshall was the Director of the National Center for Health Services Research, and Otis R. Bowen was the Secretary of the Department of Health and Human Services.

Yet, appellant conceded to the district court, and in her brief to this court, that she should have named the Secretary of the DHSS as the defendant.[2] We hold that an issue conceded at the district court level cannot be reargued at this level. See, e.g., International Traveler Cheque Co. v. BankAmerica Corp., 660 F.2d 215, 224 (7th Cir. 1981) ("it is well settled law that a party cannot complain of errors which it has

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[2] This mistake was noted by appellant's previous counsel and by the district court. See, e.g., Appellant's Brief at p. 3, n.5 ("In opposing the motion to dismiss, plaintiff's previous counsel assumed that plaintiff's pro se complaint did not satisfy the requirements of 42 U.S.C. sec. 2000e-16(c). See Plaintiff's Motion to Dismiss."); Young v. Nat'l Center for Health Services Research, 704 F. Supp. 88, 89 (D.Md. 1988)("Plaintiff agrees that she should have sued the Secretary of Health and Human Services. Opposition at 1, 3.").

committed, invited, induced the court to make, or to which it consented." (Citations omitted.)); Pye v. Mitchell, 574 F.2d 476, 480 (9th Cir. 1978)("Where an issue is conceded below, it cannot be raised for the first time on appeal." (Citations omitted.))

Because the appellant has conceded that the Secretary was the proper defendant, she is barred from appealing the district court's decision that it lacked subject matter jurisdiction because the Secretary was not named as the defendant.

IV.

The Appellant also contends that the district court erred when it denied her motion to amend her complaint to name the Secretary as the proper defendant because the amendment should

have been allowed to relate back to the original complaint pursuant to Fed.R.Civ.P.15(c)[3] "[T]he language of

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[3] Rule 15(c) provides:

Relation Back of Amendments. Whenever a claim or defense asserted in the Amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect

the Rule requires, in plain and clear terms, that the notice [required under the Rule for relation back when there is a proposed change of parties] be given 'within the limitations period.'" Weisgal v. Smith, 774 F.2d 1277, 1279 (4th Cir. 1985). As the Supreme Court has cautioned, we cannot "temper the plaint meaning of the language by engrafting upon it an extension of the limitations period equal to the asserted reasonable time, inferred from Rule 4, for service of a timely filed complaint. . . . Under Rule 15(c), the emphasis is upon thee period provided by law for commencing the action against' the defendant." Schiavone v. Fortune, 477

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to the United States or any agency or officer thereof to be brought into the action as a defendant.

U.S. 21, 30 (1986); see also Weisgal, 774 F.2d at 1279. Because the plaintiff did not serve the proper defendant until 34 days after filing the complaint, Rule 15(c)'s relating back provisions cannot apply.

Because the proper defendant did not receive notice during the limitations period of the action against it, the district court was correct in holding that the amendment could not "relate back" to the date the original complaint was filed.

V.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LIH Y. YOUNG *

v. * CIVIL NO. Y-85-2547

THE NATIONAL CENTER FOR HEALTH SERVICES RESEARCH *

MEMORANDUM

Plaintiff, formerly an employee with the defendant federal agency, filed this pro se action for employment discrimination in June, 1985, pursuant to 42 U.S.C. §§ 2000e-5, 16. This Court referred the matter to a magistrate and later adopted his finding, upon an evidentiary hearing, that plaintiff's action was barred for failure to bring the grievance before an Equal Opportunity ("EEO") counselor within the

period required by 29 C.F.R. § 1613.214(a)(1)(i)(1986).* This Court, therefore, dismissed the action for failure to properly exhaust the administrative process available to federal employees.

Plaintiff obtained counsel and appealed. The Fourth Circuit Court of Appeals reversed, holding that the date

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* Plaintiff brought her grievance to the attention of the EEO officer on April 17, 1984. Magistrate Smalkin found that "the March 11, (1984) effective date of suspension is the date of the last act of discrimination comprehended within the administrative complaint at issue in this case." Edited Transcript of Oral Opinion at 4-5. The EEOC had "determined that the last discriminatory act occurred February 27, 1984." Id. at 2. The Fourth Circuit later ruled that plaintiff's constructive discharge required this Court to consider plaintiff's date of resignation, March 19, 1984, as the date of defendant's alleged last discriminatory act.

of her resignation, 29 days before her first contact with the EEO officer, was the appropriate date to start the running of the 30 day limit where plaintiff had alleged constructive discharge. 828 F.2d 235, 238 (4th Cir. 1987).

On remand, defendant has moved to dismiss the action for lack of subject matter jurisdiction. Plaintiff named only the agency as the defendant, but 42 U.S.C. § 2000e-16(c) specifically requires that in her "civil action the head of the department, agency, or unit, as appropriate, shall be the defendant." Thus, with only the agency as defendant, this Court would have no jurisdiction. Plaintiff agrees that she should have sued the Secretary of Health and Human Services. Opposition at 1, 3. However,

plaintiff argues that she should be allowed to amend her complaint, substituting the Secretary as the proper defendant, and that this amendment should be allowed to relate back to the original complaint pursuant to Fed.R.Civ.P. 15(c). Plaintiff's motion to amend is, therefore, also pending.

The Fourth Circuit recently has affirmed the strict application of Rule 15(c) in Metz v. United States Postal Service, No. 87-3050, slip opinion (4th Cir. January 4, 1988). The court relied upon its previous decision in Weisgal v. Smith, 774 F.2d 1277, 1279 (4th. Cir. 1985), where it held that even a pro se plaintiff was held to the strict requirements of Rule 15(c) for amendments to "relate back." Furthermore, its holding that Rule 15(c)

does not implicitly include "reasonable time" flexibility for meeting the rule's notice requirements has been approved by the Supreme Court. Schiavone v. Fortune, 106 S.Ct. 2379, 2385 (1986). Thus, this Court will apply Rule 15(c) strictly. Rule 15(c) reads as follows:

> (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and,within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

> The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

The court in Weisgal noted that each of three elements must be met: "(1) same transaction or occurrence; (2) the new party had notice of the action prior to the expiration of the statute of limitations; and (3) he knew or should have known that but for a mistake in identity the action would have been brought against him." 774 F.2d at 1279. Here, there is no dispute that the amended complaint would arise from the same transaction or occurrence, rather

the issue is one of the adequacy of notice to the prospective defendant.

Plaintiff was required to file her civil action within 30 days after she received notice of the final decision of the Equal Employment Opportunity Commission ("EEOC"). 42 U.S.C. § 2000e-16. The EEOC issued plaintiff a right-to-sue letter on May 18, 1985. Complaint ¶ 9. Thus, she was required to file the complaint in this action by June 17, 1985. She filed the complaint on June 14, 1985, and effected service of process upon the United States Attorney for the District of Maryland and upon the Attorney General on July 18, 1985, 34 days after the filing the complaint. Under Weisgal, the second element of Rule 15(c) relation back is that plaintiff serve notice of the

action upon a proper defendant within the same limitations period required for filing the complaint itself. Thus, plaintiff missed her opportunity to make use of relation back by amendment based upon service of other government officials pursuant to the second paragraph of Rule 15(c).

Plaintiff argues that "although she did not serve the United States Attorney or the Attorney General within the thirty-day period, she did effect 'prompt service' within the requirements of Rule 4." Opposition at 6. Rule 4(a)'s "prompt service" requirement cannot be raised as a shield to the strictly interpreted requirements of Rule 15(c). The adoption of the same period of limitations under Rule15(c) is an independent due process protection

preventing an effective breaching of the original statute of limitations when a plaintiff realizes she has sued the wrong party. Thus, the limitations period is applicable to all defendants, proper as well as improper. Plaintiff's argument attempts to accomplish the same sort of "reasonable time" flexibility rejected by the Supreme Court in Schiavone and the Fourth Circuit in Metz and Weisgal.

Plaintiff's second argument is that "[d]efendant's unreasonable delay in raising this defense should bar the defense." Opposition at 7. In other words, defendant was too late in saying that plaintiff was too late. The Court finds plaintiff's defense of laches to be the proverbial pot calling the kettle black. While it is true that the United

States Attorney did litigate the issue of the timeliness of the EEO grievance in this Court and the Fourth Circuit, it was not required to raise all its defenses in its answer to plaintiff's complaint.

Finally, plaintiff claims to have relied upon the standard form complaint sheet provided by the clerk of the court while unrepresented by counsel. The Court has examined this form, used by some pro se plaintiffs. The form adequately outlines the essential elements of a complaint to be filed in federal district court. It does not, nor could it, attempt to pretend to provide for all the factual and legal issues which may arise in the course of litigating an employment discrimination case. Such suits are susceptible to

dismissal for a variety of jurisdictional reasons, circumstances, and procedural mistakes, such as plaintiff's untimely service here. An attorney's assistance is especially important for plaintiffs attempting to navigate these waters after having their EEOC charges rejected. Nonetheless, however tolerant the court may be of administrative or presentation inelegance on the part of pro se plaintiffs, the rules of procedure apply equally to represented and unrepresented parties. Moreover, this Court has no power to act where, as here, there is no jurisdiction.

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1081

LIH Y. YOUNG

Plaintiff - Appellant

versus

NATIONAL CENTER FOR HEALTH SERVICES RESEARCH

Defendant - Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frederic N. Smalkin, District Judge. (CA-85-2547-Y)

Argued: June 3, 1987

Decided: Sept. 9, 1987

BEFORE WINTER, Chief Judge, RUSSELL AND WIDENER, Circuit Judges.

WINTER, Chief Judge:

Dr. Lih Young sued her former

employer, the National Center for Health Services Research (NCHSR), under 42 U.S.C. § 2000e-16, alleging that it discriminated against her because she is of Chinese national origin. After an evidentiary hearing, the district court found that Dr. Young had failed to bring her grievance to an Equal Employment Opportunity (EEO) counselor within 30 days as required by 29 C.F.R. § 1613.214(a)(1)(i) (1986). The court therefore dismissed the suit for failure to exhaust administrative remedies. We think the record supports the conclusion that plaintiff brought her claim for constructive discharge to the EEO counselor within the required 30 days, and accordingly we reverse.

I.

From 1982 to March 19, 1984, Dr.

Young was employed as an economist by NCHSR, which is a division of the United States Department of Health and Human Services. Dr. Young alleges that her employer discriminated against her throughout the period of her employment. She asserts, for example, that because of her national origin her supervisor treated her abusively, she was denied sick leave and annual leave, she was not given adequate access to training facilities, she was improperly suspended from duty effective March 11, 1984, and that was ultimately forced to resign on March 19, 1984.

On April 17, 1984 -- twenty-nine days after she resigned -- Dr. Young contacted an EEO counselor to complain that NCHSR's actions were discriminatory. The counselor's report

on the meeting summarized Dr. Young's complaints about abusive treatment and arbitrary denial of leave, and it stated that "[c]ontinual harassment has lead to her feeling sick and feeling forced to resign which she did on March 19, 1984." On April 19, 1984, two days after the meeting with the counselor, Dr. Young filed a formal complaint with the EEOC; that complaint was not produced in the district court and is not in the record on appeal. However, in a letter that is part of the record, the Department of Health and Human Services rejected Dr. Young's complaint on the grounds that she had contacted the EEO counselor more than thirty days after the last alleged act of discrimination. The EEOC sustained the Department's decision.

Dr. Young then filed a pro se

complaint in the district court, charging NCHSR with numerous distinct acts of discrimination and alleging that the discrimination continued through April, 1984, when she contacted the EEO counselor. In particular, the complaint asserted that Dr. Young had been forced to resign on march 19; it alleged that the agency director would not address her grievances about her suspension and sick leave unless she resigned, and that the director asked for her identification card and prepared a resignation form for her signature.

The suit was referred to a magistrate, who convened an evidentiary hearing to determine whether Dr. Young had brought her grievance to the EEO counselor within the required thirty days. After the hearing, the court

ruled against Dr. Young and dismissed the suit. The court recognized that Dr. Young had contacted the counselor twenty-nine days after her resignation but concluded that the resignation was merely an "inevitable consequence" of the prior acts of alleged discrimination and "not itself a discriminatory act." Dr. Young, who is now represented by counsel, appeals from this holding.

II.

It is settled law that a federal employee must seek administrative review of her grievance before filing a suit for unlawful discrimination in employment. See 42 U.S.C. § 2000e-16(b) & (c); 29 C.F.R. § 1613.211 et seq.; Zografov v. V.A. Medical Center, 779 F.2d 967, 968-69 (4 Cir. 1985). As a first step, the employee must speak to

an EEO Counselor about an alleged act of discrimination within 30 days of the alleged act. 29 C.F.R. 1613.214(a)(1)(i) (1986).

It is also settled that the applicable administrative deadlines run from the time of the discriminatory act, not from the time of a later, inevitable consequence of that act. Delaware State College v. Ricks, 449 U.S. 250 (1980); United Airlines v. Evans, 431 U.S. 553 (1977). Whether an employer's action is a "discriminatory act" or merely an "inevitable consequence" of prior discrimination depends on the particular facts of the case. Ricks, 449 U.S. at 258 n.9. A resignation is not itself a "discriminatory act" if it is merely the consequence of past discrimination, but if the employer discriminates against an

employee and purposely makes the employee's job conditions so intolerable that a reasonable person would feel forced to resign, then the resignation is a constructive discharge -- a distinct discriminatory "act" for which there is a distinct cause of action. See Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4 Cir. 1985); EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 672 (4 Cir. 1983). If the employee has related discrimination claims that are barred by limitations or failure to exhaust, "these actions should be allowed as evidence on the question of whether [plaintiff] was constructively discharged." Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5 Cir. 1981).

In our view, the allegations of Dr.

Young's complaint, as well as the facts brought out in the evidentiary hearing, make out a claim that she was constructively discharged on March 19 and that she complained about that constructive discharge to her EEO counselor 29 days later, on April 17. It is undisputed that Dr. Young contacted the EEO counselor on April 17 and, according to the counselor's report, complained that "[c]ontinual harassment has lead to her feeling sick and feeling forced to resign which she did on 3/19/84." We think "continual harassment," if it in fact occurred, could certainly make working conditions so "intolerable' that a reasonable person would feel forced to resign. See Bristow, 770 F.2d at 1265. Similarly, her claim of constructive discharge is

supported by Dr. Young's allegations and testimony that the agency director would not act on her grievances unless she resigned. And it is possible to infer discriminatory purpose from Dr. Young's many other allegations of discrimination. See Downey, 649 F.2d at 305 (other discriminatory acts are relevant to whether constructive discharge was discriminatory). Finally, we are mindful of the traditional rule that EEO pro se complaints are to be liberally construed, President v. Vance, 627 F.2d 353, 362 (D.C. Cir. 1980), and for this reason we do not think it fatal to her case that Dr. Young's administrative complaints did not use the precise words "constructive discharge."

We are unsure whether the district

court's dismissal of the suit was a dismissal under Fed. R. Civ. P. 12(b)(6) or an entry of summary judgment under Fed. R. Civ. P. 56, but we need not decide this issue because in either event the judgment of the district court must be reversed. The complaint adequately alleges that Dr. Young brought her constructive discharge claim to the EEO counselor within 30 days, and the evidentiary hearing raises a genuine issue of material fact as to whether there was a constructive discharge.

NCHSR contends that even if Dr. Young complained of the resignation to the EEO counselor on April 17, she still did not meet all the regulatory requirements because she made no mention of the resignation in her formal complaint on April 19. We think that

this contention is foreclosed. The defendant has the burden of proving the affirmative defense of failure to exhaust administrative remedies, Brown v. Marsh, 777 F.2d 8, 13 (D.C. Cir. 1985), and yet NCHSR has not produced a copy of the very complaint it claims is defective -- even though it admits that the complaint was filed with the Department of Health and Human Services and is presumably in the custody of the government. Under the circumstances, we decline to presume that the complaint was defective for failure to include mention of her resignation as a constructive discharge about which she had complained orally.*

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* Unquestionably, Dr. Young gave the agency oral notice of a claim of constructive discharge. We neither decide the question nor express any view thereon, but we do note that, in an

III.

In sum, we hold that the district court erred by ruling that the allegedly forced resignation on March 19 could not be a "discriminatory act," so that we conclude that Dr. Young has alleged facts showing that she exhausted her administrative remedies. The case must be returned to the district court for determination on its merits.

REVERSED AND REMANDED

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appropriate case, language in Brown, 777 F.2d at 13, and in President, 627 F.2d at 361, may provide a basis for the argument that the absence of an allegation of discriminatory treatment in the formal written complaint is not fatal to a claim for relief if notice of the alleged discriminatory treatment was given at an earlier state of the grievance process or at some later time before the agency issued its final decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LIH Y. YOUNG *

v. * CIVIL NO. Y-85-2547

THE NATIONAL CENTER FOR HEALTH SERVICES RESEARCH *

(EDITED) TRANSCRIPT OF ORAL OPINION

This is a Title VII action filed by the plaintiff on June 14, 1984, pro se, seeking judicial redress for alleged acts of discrimination against her on account of her national origin (Chinese) that occurred while she was employed as a Ph.D. researcher with the National Center for Health Services Research, a division of the United States Department of Health and Human Services (HHS). This Court has jurisdiction under 42

U.S.C. § 2000e-16. The matter was referred to me, with consent, pursuant to 28 U.S.C. § 636(c) by Judge Young's order dated December 17, 1985. The challenged actions of the agency (HHS) were the subject of a decision by the EEOC in Appeal #01842738. That appeal, decision on which was rendered May 3, 1985, was taken from a final action by the agency dated August 20, 1984, in File #ASH401-84. A copy of that final agency decision was incorporated in the record of an evidentiary hearing held by this Court March 6, 1986, as Court's Exhibit #1. The EEOC determination in Appeal #01842738 was appended as an exhibit to the complaint.

The EEOC found that plaintiff had not timely sought EEO counselling, within 30 calendar days of the date of

any act of discrimination alleged in the complaint to the agency, or, in the case of a personal action, within 30 calendar days of its effective date. See 29 C.F.R. § 1613.214(a). The EEOC found, and such finding is not contested on judicial review, that plaintiff first sought EEOC counselling from the agency with regard to the 10 discrete matters at issue on April 17, 1984. The EEOC found that the last act of discrimination among the 10 allegations dealt with in the agency's final decision occurred on February 27, 1984. The EEOC, after finding that plaintiff's delay in seeking EEO counselling with regard to these matters (some 50 days) rendered her agency complaint untimely under 29 C.F.R. § 1613.214(a)(1)(i), went on to consider whether the

ameliorating provisions of 29 C.F.R. § 1613.214(a)(4)(i) and (ii) were applicable. The EEOC found that the plaintiff was aware of her right to seek EEO counselling, in view of her prior EEOC complaints that had gone through counselling, on to agency decision, and further on to EEOC review. The Commission rejected plaintiff's claim that illness precluded her from acting timely for want of any "documentary evidence" indicating that she was so ill that she could not act in a timely fashion. The EEOC also considered plaintiff's contention that she contacted the EEOC counselor within 30 days next following her March 19, 1984 resignation, but as the EEOC noted, none of the acts complained of (and which are the subject of the present quest for

judicial review) occurred as late as March 19. Rather, the EEOC determined that the last discriminatory act occurred February 27, 1984.

Upon review of the file, I contacted Dr. Young and counsel, by letter dated January 6, 1986 (Docket Entry #5), in which I informed the parties that there was a serious question as to failure to exhaust administrative remedies raised by the facts of the case, considered in light of the Fourth Circuit's decision in Zografov v. V.A. Medical Center, 779 F.2d 967 (1985). I furnished plaintiff with a copy of the Zografov decision for her reference. I set, in the January 6, 1986 letter, an evidentiary hearing for March 6, 1986, to determine whether plaintiff has so failed to exhaust her

administrative remedies that this case ought to be dismissed therefor, or whether the case ought to proceed on to the merits of her underlying claim of discrimination. The hearing was duly held on March 6, 1986. The plaintiff testified at length regarding her work history at the National Center, her personal circumstances, and the circumstances surrounding this particular complaint of discrimination, as well as several others. Counsel for the defense introduced several exhibits, but no testimony was presented for the defendant.

Until the Fourth Circuit's decision in Zografov, the law was unsettled in this Circuit as to whether noncompliance with the timeliness requirement of 29 C.F.R. § 1613.214(a)(1) deprived the

district court of subject matter jurisdiction over the complaint. Zografov settled the issue, holding that untimeliness in the administrative prosecution of the claim was not a jurisdictional defect, but, rather, was a matter of exhaustion of administrative remedies. The Fourth Circuit went on to hold that, as such, the exhaustion requirement was subject to equitable tolling in an appropriate case, under the doctrine of estoppel, against the Government. The court held that the least the court would require to establish an estoppel against the United STates is a showing of "affirmative misconduct on the part of the government...." 779 F.2d at 967. See also Schweiker v. Hansen, 450 U.S. 785, 788 (1981).

The Court is of the opinion that is not bound by the findings of the EEOC in the matter with regard to timeliness. Because the inquiry is essentially an equitable one, the Court must determine the facts as a matter of first impression. Taking into account the documentary evidence introduced at the March 6 hearing and the testimony of Dr. Young, I find as a fact that the last discriminatory act that is within the scope of plaintiff's complaint in this case occurred on March 11, 1984, which was the effective date of her suspension. To the extent that the EEOC found that the February 27, 1984 date was the date of the last discriminatory act, it erred, in view of Court's Exhibit 1 (the final agency action) showing that among her 10 allegations,

the plaintiff clearly complained of a suspension that was to become effective March 11, 1984. In that the effective date of a personnel action is the date of "accrual" of a discrimination complaint for exhaustion purposes under 29 C.F.R. § 613.214(a)(1), the March 11 effective date of suspension is the date of the last act of discrimination comprehended within the administrative complaint at issue in this case. The Court finds as an uncontested fact that plaintiff did not seek EEO counselling with regard to any of the 10 allegations at issue until April 17, 1984. Thus, there was a delay beyond 30 days from the last act of discrimination until EEO counselling was sought.

Turning to the issue of equitable estoppel, the Court finds absolutely no

indication of affirmative misconduct on the part of the Government. Dr. Young attributed the delay in seeking EEO Counselling to several factors. One is the mental stress and headaches that she had apparently experienced since the inception of what she perceives to have been a long course of discriminatory treatment at the hands of the defendant, starting almost as soon as she arrived on the job. However, she was not hospitalized during the period January - April, 1984, and there is utterly no indication that affirmative Government misconduct, in the sense used in the case law, accounted for Dr. Young's alleged tension headaches and stress. The fact that an employee might react to what she perceives as discriminatory conduct with stress and headaches does

not equate to affirmative Government misconduct within the meaning of the phrase as used in Zografov.

The plaintiff resigned from Government employment on March 19, 1984, apparently after an unsuccessful attempt to resolve her entire employment situation with supervisory personnel. The plaintiff claims that she was under the impression that, after resignation, she no longer had any right to pursue any complaints, including the 10 allegations here at issue, through EEO counselling or otherwise. Plaintiff testified that this was a general impression of hers, and when queried as to the specific sources for it, she identified her retained attorney and a co-worker (not a supervisor) who was a union shop steward at her place of work.

it is obvious that in neither case would such erroneous advice from these sources constitute such affirmative Government misconduct as to stop the running of the 30 day regulatory action period by equitable estoppel.

The Court recognizes that, in certain narrow circumstances, acts of continuing discrimination may form an exception to the timeliness requirement. However, the present effects of prior discrimination do not suffice to make continuing discrimination; what is needed is a present violation. See, e.g., United Airlines v. Evans, 431 U.S. 533 (1977). Given the March 6 hearing testimony, the Court cannot find any act of continuing discrimination that was effective as a personnel matter or that otherwise took place after March 11,

1984, that alleviated the need for timely filing in this case. It is the time of the discriminatory act, not of its consequence, that is the key. Delaware State College v. Ricks, 449 U.S. 250 (1980). Thus, even if Dr. Young's March 19 resignation be viewed as an "inevitable consequence" of the issues raised in Agency Case #ASH401-84, either alone or in combination with prior complaints, that resignation is still only a consequence, not itself a discriminatory act, under the case law. Id. Therefore, the time for EEO counselling began to run March 11, not March 19.

The Court has also considered the equitable tolling factors listed in a somewhat different, but analogous, context by the Supreme Court in Baldwin

County Welfare Center v. Brown, 466 U.S. 147, 151 (1984) (per cuiam), one of which was met in this case. The plaintiff was represented by retained counsel, she was not affirmatively misled by anyone for whose conduct the Government was responsible, and, in view of her prior EEO complaints (see defendant's Exhibits 1 and 2), she certainly knew of EEOC counselling requirements governing employees seeking to raise complaints of discrimination in the federal workplace. See also Miller v. IT&T Corp., 755 F.2d 20, 24 (2d Cir. 1985).

With regard to other complaints of discrimination that plaintiff might have that predate the matters considered by the EEOC in Appeal #01842738, the plaintiff at the hearing expressed an

intention to have them considered by this Court. The Court also notes that in a letter to Judge Young dated December 12, 1985, she had the following to say about those other complaints:

> I have other discrimination complaints filed previously that are still pending on the decisions of Equal Employment Opportunities [sic] Commission for more than a year. These involve within grade increase, performance appraisal, promotion and physical threat by the supervisor, etc. May I bring them over to this court for your investigation?

Although pro se complaints are to be liberally construed, cf. Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam); Gordon v. Leeke, 574 F.2d 1147 (4th Cir.), cert. denied, 439 U.S. 970 (1978), the Court cannot construe Dr. Young's December 12, 1985 letter as a request to amend her Title VII complaint in this case, which was predicated only

on one EEOC action and the claims subsumed therein. This Court, of course, does not investigate complaint but rather, is confined to judicial resolution, in adversary proceedings of contested issues of fact and law. Although leave to amend is to be freely granted under FED. R. CIV. P. 15, in view of the fact that at least some of the complaints raised in Dr. Young's earlier EEOC proceedings do not involve questions of timeliness, it would not be appropriate to amend the present complaint at this juncture, because, as indicated above, this complaint is subject to dismissal for failure to exhaust administrative remedies, without inquiry into the merits of the matters asserted therein. If Dr. Young wishes to seek judicial review of the other

EEOC matters that she has pursued administratively, she may institute a proper complaint pursuant to 42 U.S.C. § 2000e-16 in this Court, as she did with regard to the present case.

For the reasons stated above, and in accordance with the Fourth Circuit's ruling in Zografov, this Court is constrained to hold that the plaintiff has not exhausted her administrative remedies with regard to EEOC Case #01842738 and the allegations subsumed therein, as set forth in Agency Decision #ASH401-84 and, therefore, the present complaint must be dismissed for failure to exhaust administrative remedies. A

separate order will be entered so providing.

Frederic N. Smalkin
United States Magistrate

Dated: March 7th, 1986

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Washington, D.C. 20507

Dr. Lih Y. Young Appellant,	)	
	)	Appeal No.
v.	)	01842738
	)	Agency No.
Department of Health Human Services Agency.	)	ASH-401-84

DECISION

INTRODUCTION

Dr. Lih Y. Young (hereinafter referred to as appellant) initiated an appeal dated September 11, 1984, from the final agency decision dated August 20, 1984, of the Department of Health and Human Services (hereinafter referred to as agency) rejecting her complaint of discrimination based on national origin (Chinese) and reprisal (previous EEO

complaint) for untimeliness. The appeal was brought under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §2000e et seq. There appears to be a question as to whether appellant's initiation of this appeal was timely. However, given that there is no evidence indicting when appellant received the final agency decision, the Commission presumes five days delivery time from the date of decision. Therefore, appellant's appeal is accepted for decision by the Commission in accordance with EEOC Order No. 960, as amended.

BACKGROUND

The record reflects on April 17, 1984, appellant contacted an EEO Counselor regarding alleged acts of discrimination by the agency. On April

18, 1984, appellant filed an informal complaint of discrimination based on national origin (Chinese) and reprisal (previous EEO complaint). The EEO Counselor was unable to resolve the matter, and on June 19, 1984, appellant filed a formal complaint based on the above legal allegations. Additionally, appellant made factual allegations concerning ten (10) acts of discrimination and/or reprisal which occurred between January 23, 1984, and February 27, 1984. On August 20, 1984, the agency issued a final decision rejecting appellant's complaint because she failed to bring her allegations to the attention of an EEO Counselor in a timely manner.

ANALYSIS AND FINDINGS

The issue in this case is whether appellant brought to the attention of an EEO Counselor her allegation of discrimination in a timely manner. According to EEOC Regulation 29 C.F.R. §1613.214(a)(1)(i), a complainant must bring to the attention of an EEO Counselor the matter causing [her] to believe [she] had been discriminated against within 30 calendar days of the date of that matter or, if a personnel action, within 30 calendar days of its effective date. In the instant case, the record shows that appellant actually brought to the attention of the EEO Counselor matters causing her to believe she was discriminated against, on April 17, 1984. The Counselor's Report shows that the alleged discriminatory actions all occurred between January 23, 1984

and February 27, 1984. In view of the facts, the Commission holds that the last discriminatory act occurred on February 27, 1984, some 50 days prior to appellant's contact with the EEO Counselor. Therefore, we agree with the agency's decision that appellant failed to contact the EEO Counselor in a timely manner.

The Commission notes here that on appeal, appellant stated her belief that the time limit for contacting the EEO Counselor should be extended in this case because when was ill and unaware of her EEO rights. She further stated that she sought EEO counseling within 30 days of her March 19, 1984, resignation from the agency. The Commission advises appellant that EEOC regulation 29 C.F.R. §1613.214(a)(4), provides that the

agency shall extend the time limits:

> (i) When the complainant shows that [she] was not notified of the time limits and was not otherwise aware of them, or that [she] was prevented by circumstances beyond [her] control from submitting the matter within the time limits; or
>
> (ii) for other reasons considered sufficient by the agency.

In view of the above Regulations, the Commission must reject appellant's contentions on appeal because she failed to produce any documented evidence indicating that she suffered an illness during the time period of the alleged acts of discrimination, which prevented her from submitting the matter(s) within the time limit. Further, we do not accept appellant's assertion that she

was not aware of her rights, because the record shows that she was involved in previous EEO activity. Finally, the Commission agrees with appellant's assertion that she contacted the EEO Counselor within 30 days of their resignation, however, as we pointed out above, the actions she complained of occurred 50 days prior to her contact. Thus, the Commission holds that appellant failed to contact the EEO Counselor in a timely manner.

CONCLUSION

Based on a review of the record, it is the decision of the Equal Employment Opportunity Commission to affirm the rejection of appellant's complain for the reasons stated herein.

NOTICE OF RIGHT TO FILE A CIVIL ACTION

Pursuant to 29 C.F.R. §1613.282, the appellant is hereby notified that this decision is final and that he or she has the right to file a civil action on the Title VII claim in the appropriate U.S. District Court within thirty (30) days of the date of receipt of this decision.

APPOINTMENT OF COUNSEL

If appellant elects to file a civil action and does not have or is unable to obtain the services of an attorney to acts as his or her counsel, appellant may request that the Court appoint an attorney for purposes of the civil action. The Court in its discretion may appoint an attorney to represent

appellant and authorize commencement of the action without the payment of fees, costs, or security. A request for the appointment of counsel must be filed with the Court within the time limit for filing a civil action.

NOTICE OF RIGHT TO REQUEST REOPENING

The appellant and the agency are hereby notified that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued;

2. The previous decision involves an erroneous interpretation of law or regulations or misapplication of established policy; or

3. The previous decision is of precedental nature involving a new or unreviewed policy consideration that my have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

This notice is in accord with 29 C.F.R. §1613.235. As provided therein, agency requests to reopen must be filed within 30 days from the date of receipt of this decision.

FOR THE COMMISSION

5-3-85
Date

Dolores L. Rozzi,
Director
Office of Review
and Appeals

August 20, 1984

REGISTERED MAIL, RETURN RECEIPT REQUESTED

Dr. Lih Y. Young
1121 Pipeston Place
Rockville, MD 20854

Dear Ms. Young:

This letter is to inform you of the Department's decision concerning the complaint of discrimination based on national origin (Chinese) and a complaint of reprisal for having previously filed an EEO complaint, which you filed on June 19, 1984 against the Office of the Assistant Secretary for Health (OASH).

Issue/Allegation No. 1

You alleged that, because of you national origin you received a letter of admonishment on January 23, 1984.

Issue/Allegation No. 2

You alleged that, because of your national origin, you received an official reprimand on February 1, 1984.

Issue/Allegation No. 3

You alleged that, in reprisal for having previously filed an EEO complaint, you received an official reprimand on February 1, 1984.

Issue/Allegation No. 4

You alleged that, because of your national origin, you received on March 9, 1984, a decision to suspend you from government employment during the period of March 11, through 17, 1984.

Issue/Allegation No. 5

You alleged that, in reprisal for having previously filed an EEO complaint, you received on March 9, 1984, a decision to suspend you from government employment during the period from March 11 through 17, 1984.

Issue/Allegation No. 6

[ILLEGIBLE]

Issue/Allegation No. 7

You alleged that in reprisal for having previously filed an EEO complaint, you were denied eighty (80) hours of sick leave which was to be used during the period of February 27 through March 9, 1984.

Issue/Allegation No. 8

You alleged that, because of your national origin, you were denied a within-grade salary increase upon reconsideration on February 17, 1984.

Issue/Allegation No. 9

You alleged that, in reprisal for having previously filed an EEO complaint, you were denied a within-grade salary increase upon reconsideration on February 17, 1984.

Issue/Allegation No. 10

You alleged that, because of your national origin, you received an unsatisfactory performance appraisal on January 24, 1984 for the period of January 1, 1983 through December 31, 1983.

The final EEO Counseling Report reflects

that you initially contacted an EEO counselor concerning these matters on April 17, 1984.

Under the provisions of Title 29, Code of Federal Regulations, Section 1613.214 (29 CER 1613.214), a complaint must be brought to the attention of an EEO counselor within thirty (30) calendar days of the date of the incident which gave rise to the complaint for the purpose of attempting informal resolution. Otherwise, the complaint is subject to rejection under the provisions of 29 CER 1613.215.

Inasmuch as you failed to bring the above issue/allegations to the attention of an EEO counselor in a timely manner

your complaint is subject to rejection.

DECISION

Accordingly, it is the decision of the Department of Health and Human Services to reject, under the provisions of 29 CFR 1613.214-215, your complaint of discrimination based on national origin and your complaint of reprisal, because of untimeliness.

If you are dissatisfied with this decision, you may write a written notice of appeal, in duplicate, to the Equal Employment Opportunity Commission, Attention: Office of Review and Appeals, 2401 E Street, N.W., Washington, D.C. 20506; and in accordance with 29 CFR 1613, Section 233, which states:

(a) Except as provided in paragraph (b) of this action, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within (30) calendar days of filing the notice of appeal.

(b) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless,

based upon a written showing by the complainant that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of a notice of approval within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the appeal.

If you have alleged age discrimination, you may file a civil action in an appropriate U.S. District Court at anytime within 180 calendar days of the unlawful age discriminatory action, provided that the Equal Employment

Opportunity Commission (EEOC) is given 30 calendar days advance notice of the intent to file a civil action. If you wish to appeal this decision to EEOC, the appeal decision will give notice of all further rights of review and appeal under the Age Discrimination in Employment Act.

If the complaint is based on allegations other than age discrimination, you have the alternative of seeking judicial relief by filing a civil action in an appropriate U.S. District Court within thirty (30) calendar days after receipt of the agency's notice of final decision. Please note: If you file a notice of appeal with the Commission, the right to file a civil action will be preserved. In that case, you may file a

civil action within thirty (30) calendar days after receipt of the Commission's decision or you may file a civil action if the Commission has not issued its decision (30) calendar days after receipt of the Commission's decision or you may file a civil action if the Commission has not issued its decision or you may file a civil action if the Commission has not issued its decision (30) calendar days after the date on which the Office of Review and Appeals accepted the appeal.

If you elect to file a civil action, you are advised that you may apply to, U.S. District Court for appointment of an attorney to represent you in any court providing relating to this decision. The court may appoint an attorney to

represent you and may permit commencement of a court action without payment of fees, costs, or security.

Sincerely,

/s/Thomas S. McFee

Thomas S. McFee
Director
Equal Employment
Opportunity

cc: Samuel Hoston, Director, DCAM
Dan Hordon, Deputy Director,
Equal Employment, EEO
Caroline Pike

ENTRY OF APPEARANCE

Robert B. Fitzpatrick, Esq., a member of the Bar of the United States Supreme Court, hereby enters his appearance as counsel of record on behalf of petitioner Lih Y. Young.

ROBERT B. FITZPATRICK

FITZPATRICK & VERSTEGEN
Spring Valley Center
4801 Massachusetts Avenue, N.W.
Washington, D.C. 20016

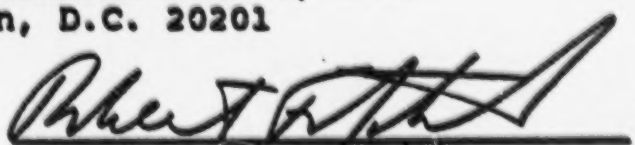
(202) 364-8710

CERTIFICATE OF SERVICE

I, Robert B. Fitzpatrick, hereby certify that on this 26th day of December 1989, I caused to be served three copies of the foregoing Petition for Writ of Certiorari and Entry of Appearance, by depositing said copies in a United States mailbox, with first class postage prepaid and addressed as follows:

Solicitor General
Office of the General Counsel
Washington, D.C. 20530

Timothy M. White, Esq.
Office of the General Counsel
U.S. Department of Health and
Human Services
330 Independence Avenue, S.W.
Washington, D.C. 20201



Robert B. Fitzpatrick

Supreme Court, U.S.
FILED
FEB 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1010

In the Supreme Court of the United States

OCTOBER TERM, 1989

LIH Y. YOUNG, PETITIONER

v.

NATIONAL CENTER FOR HEALTH SERVICES RESEARCH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
MICHAEL JAY SINGER
WILLIAM G. COLE
Attorneys
Department of Justice
Washington, D.C. 20530
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, when an employment discrimination claim under 42 U.S.C. 2000e-16(c) failed to name the proper defendant, the 30-day limitations period for filing the claim should be tolled to permit amendment pursuant to Fed. R. Civ. P. 15(c).

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1010

LIH Y. YOUNG, PETITIONER

v.

NATIONAL CENTER FOR HEALTH SERVICES RESEARCH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32a-42a) is unpublished, but the decision is noted at 887 F.2d 235 (Table). The opinion of the district court (Pet. App. 43a-53a) is reported at 704 F. Supp. 88.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1989. The petition for a writ of certiorari was filed on December 27, 1989.[1] The juris-

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[1] We have been informed by the Clerk of this Court that this civil petition was timely filed because the Court building was closed on December 26, 1989. Compare Sup. Ct. R. 30.1 with Sup. Ct. R. 29.1 (1980).

diction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends that the district court erred in dismissing her employment discrimination suit against the National Center for Health Services Research (NCHSR), a unit of the Department of Health and Human Services.

1. Petitioner was employed by NCHSR from 1982 to March 19, 1984, as an economist. She alleges that her employer discriminated against her during this period of employment because of her Chinese national origin. Pet. App. 55a-56a. She claims that this led to her being improperly suspended from duty effective March 11, 1984, and that she was ultimately forced to resign on March 19, 1984 (*id.* at 56a).

On April 17, 1984—29 days after she resigned—petitioner contacted an Equal Employment Opportunity counselor to complain that NCHSR had discriminated against her. Petitioner thereafter filed a formal EEO complaint (Pet. App. 96a).[2] Her complaint was rejected by HHS on August 20, 1984 for untimeliness (*id.* at 96a-106a). Petitioner appealed this decision to the Equal Employment Opportunity Commission, which affirmed the HHS ruling in an opinion dated May 3, 1985 (*id.* at 85a-95a). The EEOC determined that petitioner had failed to contact an EEO counselor within 30 days of the challenged discriminatory actions, as she was required to do by 29 C.F.R. 1613.214(a)(1)(i). The EEOC held that a dismissal

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[2] Although the Fourth Circuit's September 9, 1987 opinion states that the formal complaint was filed on April 19, 1984, two days after the meeting with the EEO counselor (Pet. App. 57a), the correct filing date appears to be June 19, 1984. See Pet. App. 33a, 87a, 96a.

was required because the alleged discriminatory actions all occurred between January 23, 1984, and February 27, 1984, but petitioner did not contact an EEO counselor until April 17, 1984, 50 days after the last alleged discriminatory action.

2. Petitioner appealed from this adverse EEOC decision by filing an appeal *pro se* in the District Court of Maryland on June 14, 1985. Pet. App. 34a. She named as defendant:

> National Center for Health Services Research,
> 5600 Fishers Lane
> Park Building, Room 3-50
> Rockville, Maryland 20857
> Attn: John Marshall, Director

Suit was timely filed on a form supplied by the clerk of the district court.[3] Pet. 7. The NCHSR, the Attorney General and the United States Attorney were served on July 18, 1985, 34 days after the filing of the complaint. *Id.* at 34a, 49a. Petitioner's appeal was referred by consent to a federal magistrate, who dismissed the complaint on the ground that petitioner had failed to exhaust her administrative remedies by her delay in contacting an EEO counselor. *Id.* at 67a, 72a-84a.

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[3] The district court correctly observed that petitioner "was required to file her civil action within 30 days after she received notice of the final decision of the [EEOC]." Pet. App. 49a. The record indicates that petitioner received the EEOC decision on May 18, 1985 (C.A. App. 4-5), and her complaint was filed on June 14, 1985. The district court was, therefore, correct in holding that her filing was timely since the thirty-day period expired on June 17, 1985. But see Pet. App. 49a, referring to May 18 as the date when "[t]he EEOC issued plaintiff a right-to-sue letter." Compare Pet. App. 95a (EEOC decision and right to sue notification dated May 3, 1985).

3. Petitioner obtained counsel and appealed. The court of appeals reversed (Pet. App. 54a). "[M]indful of the traditional rule that EEO *pro se* complaints are to be liberally construed" (*id.* at 63a), the court interpreted petitioner's resignation of March 19, 1984 as a "constructive discharge," and, therefore, as a discriminatory act. Since this discriminatory act occurred only 29 days before petitioner's first contact with an EEO counselor, she was held to have complied with 29 U.S.C. 1613.214(a)(1)(i). Her complaint was accordingly remanded to the district court for a determination on the merits. Pet. App. 63a-64a.

4. On remand, the government moved to dismiss because petitioner had not named the "head of the department, agency, or unit, as appropriate" as defendant, a requirement of 42 U.S.C. 2000e-16(c). Petitioner agreed that she should have named the Secretary of HHS, rather than the NCHSR, as the defendant, and asked leave to amend her complaint, substituting the Secretary as the defendant. She further requested that this amendment be allowed to relate back to the original complaint pursuant to Fed. R. Civ. P. 15(c). Pet. App. 34a-36a.

The district court denied petitioner's request, ruling that she could not avail herself of the "relation back" provisions of Rule 15(c) since she had not effected service on any government defendant within the "period provided by law for commencing the action against the party to be brought in by amendment." Rule 15(c).

The court of appeals affirmed. Relying on this Court's opinion in *Schiavone* v. *Fortune*, 477 U.S. 21, 30 (1986), it sustained the district court's decision that Rule 15(c) could not be invoked since there had

been no timely service on the proper defendant. Pet. App. 39a-42a.[4]

ARGUMENT

1. Under Rule 15(c) of the Federal Rules of Civil Procedure, an amendment changing a party against whom a claim is asserted "relates back" to the date the original complaint was filed only if a plaintiff has given adequate notice to the proper defendant within the applicable limitations period. As this Court explained in *Schiavone*, 477 U.S. at 29:

> Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Petitioner, like the petitioners in *Schiavone*, failed to satisfy the second, third and fourth requirements. She filed her civil action on June 14, 1985, on the Friday before the Monday which was the last possible day for filing. Her complaint, however, failed to name the proper statutory defendant, the Secretary of HHS. The first notice received by any of the *named* defendants in the case was 34 days later, July 18, 1985. Pet. App. 49a. Therefore, the Secretary of

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[4] The court of appeals also held that petitioner could not contend on appeal that she had named and served the proper defendant, *i.e.*, John Marshall, director of the NCHSR, since she had conceded in the district court that the Secretary of HHS was the proper defendant. Pet. App. 38a.

HHS neither received notice nor "should have known" about the action by June 17, the last day within the prescribed limitations period.

While Fed. R. Civ. P. 4(j) provides for the service of a complaint on the named defendants within 120 days of its filing, this Court's decision in *Schiavone* makes clear that a plaintiff who seeks to substitute a new party defendant under Rule 15 must nevertheless ensure that the new defendant receives notice within the applicable limitations period. Petitioner was entitled to assume that the U.S. Marshal would complete service on the named defendants within the time provided by Rule 4(j); but because she filed her complaint on the Friday before the limitation period expired, she could scarcely have expected that the named parties would receive actual notice, or the proper parties constructive notice, before the limitations period expired.

2. Petitioner argues that the circumstances of this case warrant an equitable tolling of the limitations period so that Rule 15(c)'s "period provided by law for commencing the action" can be extended to permit an amendment to relate back. Pet. 11. This fact-bound contention does not merit review.[5]

The courts of appeals are divided on the question whether Title VII's 30-day filing period is a statute of limitations that is subject to equitable tolling or is, instead, a jurisdictional requirement that cannot be waived or enlarged on the basis of equitable consid-

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[5] This Court recently denied certiorari in two cases raising very similar issues. *Schoo* v. *United States Postal Service*, 865 F.2d 1259 (4th Cir. 1988) (Table), cert. denied, 109 S.Ct. 3185 (1989), and *Johnson* v. *United States Postal Service*, 861 F.2d 1475 (10th Cir.), cert. denied, 110 S.Ct. 54 (1989). The same result is warranted here.

erations. See *Irwin* v. *Veterans Administration*, cert. granted, No. 89-5867 (Feb. 20, 1990). But petitioner can claim no equities that would support equitable tolling, even in a jurisdiction that permitted it.[6]

Petitioner suggests that this case would have been decided differently in the District of Columbia and Eighth Circuits. She cites as support for this statement *Mondy* v. *Secretary of the Army*, 845 F.2d 1051 (D.C. Cir. 1988), and *Warren* v. *Department of Army*, 867 F.2d 1156 (8th Cir. 1989).

In *Mondy*, a claimant filed his complaint six days before the limitations period expired and moved to proceed in forma pauperis. The district court did not order service of process until the in forma pauperis motion was granted four months later (845 F.2d at 1053 n.2); the court of appeals permitted equitable tolling because it found that delay inordinate. "If the marshal's office had simply followed the path laid out by Rule 4(d) within six days of Mondy's filing, Mondy would have been entitled to relation back under Rule 15(c)." 845 F.2d at 1057. The court expressly distinguished circumstances similar to those here, noting that "the equities may not weigh in favor of a plaintiff who counts on 'same day service' [but] Mondy's behavior did not set up any such photo-finish." *Ibid.*

In *Warren*, the plaintiff also filed his complaint six days before the limitations period expired, and the district court delayed service of process for more than thirty days while an application to proceed in forma

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[6] For that reason, and because petitioner failed to identify the proper party defendant in her complaint and therefore was not entitled to the benefit of the relation back provisions of Rule 15(c), there is no need to hold this case pending the decision in *Irwin*.

pauperis was pending. 867 F.2d at 1158-1160. The court of appeals noted that the Seventh Circuit has held that the pendency of such a motion requires the tolling of the limitations period. *Ibid.*, citing *Paulk* v. *Department of the Air Force*, 830 F.2d 79 (1987). In the present case, the failure of the proper defendants to receive timely service was not due to any unusual delays attributable to the district court; there is accordingly no equitable basis for tolling the limitations period as in *Warren* and *Paulk*.

In any event, petitioner could have preserved her option to amend her complaint by delivering or mailing process "to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named." Fed. R. Civ. P. 15(c). That provision is specifically designed to provide persons suing the government with a means to protect themselves against the consequences of naming the wrong federal defendant. See *Cooper* v. *United States Postal Service*, 740 F.2d 714, 717 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 407-410 (1967). Thus, if petitioner had mailed or delivered the process to the United States Attorney or any of the other officials listed in Rule 15(c), "within the period provided by law for commencing the action against [the proper defendant]," her amendment of the complaint to name the proper defendant would have related back to the date of filing of the original complaint. She failed to do so, and the U.S. Attorney was therefore not served until July 18, 1985, more

than a month after the expiration of the limitations period.[7]

In short, it is unlikely that either the District of Columbia Circuit, the Eighth Circuit, or any other court of appeals would permit equitable tolling of the requirements of Rule 15(c) in the present case.

3. Petitioner also seeks review of the district court's conclusion that she failed to identify the correct defendant in her complaint, which referred to "National Center for Health Services Research * * * Attn. John Marshall, Director." Pet. App. 34a. As the court of appeals observed, petitioner conceded in the district court that she had named the wrong defendant. *Id.* at 38a.[8] It is clearly established that, where an issue has been conceded in the district court, it cannot be raised for the first time on appeal. *Pye* v. *Mitchell*, 574 F.2d 476, 480 (9th Cir. 1978); *International Traveler Cheque Co.* v. *BankAmerica Corp.*,

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[7] Petitioner has not alleged that HHS or the EEOC engaged in affirmative misconduct, active misrepresentation, or any other activity that would support an argument that the 30-day filing period should be tolled on the equitable grounds listed in this Court's decision in *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 151 (1984) (citations omitted):

> This is not a case in which a claimant has received notice; or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon; or where the court has led the plaintiff to believe that she had done everything required of her * * * [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction.

[8] Petitioner agrees that the concession was made. Pet. 23 n.7.

660 F.2d 215, 224 (7th Cir. 1981). While petitioner argues that such a concession may be voided when "based on an erroneous view of the law" (Pet. 23 n.7), even petitioner admits that whether the concession was in fact based on an erroneous view of the law is "far from clear." *Ibid.*

Petitioner admits that the Sixth Circuit has agreed with the district court's conclusion in *Stephenson* v. *Simon*, 427 F. Supp. 467 (D.D.C. 1976), that the only proper defendant in a Title VII action against a federal employer is "the person highest in the chain of command within a cabinet department, a military department, or an independent agency." Pet. 24-25. See *Hancock* v. *Egger*, 848 F.2d 87 (6th Cir. 1988) (service on Commissioner of Internal Revenue not sufficient under Rule 15(c) to serve as notice of Title VII suit to Secretary of the Treasury). Accord *Honeycutt* v. *Long*, 861 F.2d 1346, 1350-1351 (5th Cir. 1988) (service on head of subdivision of Department of Defense not sufficient under Rule 15(c) to serve as notice of Title VII suit to Secretary of Defense). While several courts have suggested that the statutory language is less than precise,[9] their response has not been to interpret Section 2000e-16(c) to permit the identification of subordinate federal officials as defendants. Instead, in *Williams* (830 F.2d at 31) and *Mondy* (845 F.2d at 1052 n.1), the courts suggested that agency right-to-sue letters should clearly identify for claimants the proper party defendant. The EEOC has accordingly amended its right-to-sue

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[9] *Paulk* v. *Department of the Air Force*, 830 F.2d at 80; *Williams* v. *Army & Air Force Exchange Service*, 830 F.2d 27, 31 (3d Cir. 1987); *Mondy* v. *Secretary of the Army*, 845 F.2d at 1052 n.1.

letter.[10] In light of this revision, any possible uncertainty in the statutory language should no longer lead to confusion about the proper party defendant, and the issue that petitioner attempts to raise despite her concession below is not of any continuing importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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FEBRUARY 1990

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[10] The statement of appeal rights that the EEOC now provides with its final decisions on claims of discrimination reads:

> *YOU [i.e., the complainant] MUST NAME THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD AS THE DEFENDANT. Agency or department means the national organization, and not the local office, facility or department in which you might work. DO NOT NAME JUST THE AGENCY OR DEPARTMENT.* You must also state the official title of the agency head or department head. Failure to provide the *NAME OR OFFICIAL TITLE* of the agency head or department head may result in the dismissal of your case.

See, *e.g.*, *Smith* v. *Thomas*, EEOC Appeal No. 01883225 (Feb. 2, 1989), slip op. 7-8.

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